No. 94-1381

Supreme Court, U.S.
MAR 14 1995
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In The

Supreme Court of the United States

October Term, 1994

DAVIDSON BROS., INC., a New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation, CITY OF NEW BRUNSWICK, a Municipal Corporation, C-TOWN, a Division of Krasdale Foods, Inc., and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT C-TOWN, A DIVISION OF KRASDALE FOODS, INC.

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a claim by Petitioner premised upon an alleged violation of the United States Constitution when that claim was not presented in the state court.

2. Whether the violation of an equitable servitude which is illegal, void and unenforceable constitutes an impermissible taking of a property interest in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether the violation of an equitable servitude by a private, non-government entity is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Respondent, C-Town, a Division of Krasdale Foods, Inc. is satisfied with the "List of Parties" set forth in the Petition for Writ of Certiorari and adopts same by reference hereto, as if set forth at length.

RULE 28.1 LISTING

Respondent, C-Town, is a Division of Krasdale Foods, Inc., a New York Corporation.

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No. 94-1381

In The

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October Term, 1994

DAVIDSON BROS., INC., A New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., A NEW JERSEY CORPORATION, CITY OF NEW BRUNSWICK, A MUNICIPAL CORPORATION; C-TOWN, A DIVISION OF KRASDALE FOODS, INC., AND NEW BRUNSWICK HOUSING AUTHORITY, A BODY CORPORATE AND POLITIC,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT C-TOWN, A DIVISION OF KRASDALE FOODS, INC.

OPINIONS BELOW

With one exception, Respondent, C-Town, a division of Krasdale Foods, Inc., is satisfied with the statement of the

"Opinions Below" set forth in the Petition for Writ of Certiorari and adopts same by reference hereto as is set forth at length.

This Respondent would add to the "Opinions Below" as set forth in the Petition for Writ of Certiorari, the following:

> On November 16, 1994, the New Jersey Supreme Court denied Petitioner's Petition for Certification to the Court. This is reported at __ A.2d __ (1994).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction over this Petition.

STATUTES INVOLVED

Title 28 of the United States Code, § 1257, subsection (a) states that:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be received by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed the Constitution or the treaties or statutes of or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains several misleading statements which have a bearing upon whether or not this Court should grant this Petition.

First, Petitioner protests mightily that on several occasions it raised the "takings" issue in the state courts below but that those courts inexplicably ignored that argument (Pet. 9, 15). This is not quite correct as will be demonstrated *infra.* Petitioner never raised the "takings issue" as a federal constitutional issue until it sought review by the New Jersey Supreme Court. At that time, Respondents C-Town, a Division of Krasdale Foods, Inc. ("C-Town") and New Brunswick Housing Authority, a body corporate and politic ("the Housing Authority"), both noted the impropriety of raising this federal issue for the first time on a Petition requesting the New Jersey Supreme Court to exercise its discretionary appellate authority.

It should be noted that, despite filing an amended complaint, Petitioner never bothered to plead a violation of any provision of the United States Constitution by any of the Respondents. Even after the remark by the New Jersey Supreme Court in 1990, Petitioners chose not to assert any federal claim. Its pleadings continued to be framed in terms of the New Jersey Constitution and common law breach of contract.

Furthermore, as the trial judge noted in his bench opinion, at the commencement of the remand trial, "the parties" stipulated that the constitutionality issue as it pertains to the lease transaction between the Housing Authority and C-Town is no longer an issue in the case (Pet. App. 17a). Thus, the only constitutional issue of any kind raised by Petitioner was abandoned before the retrial only to have Petitioner attempt to inject an entirely different constitutional issue (*i.e.*, the "takings

issue") on its Petition for Certification to the New Jersey Supreme Court an application which that court denied in November, 1994.

While it is to be expected that Petitioner puts its own "spin" on the facts in its "Statement of the Case", the fact of the matter is that following the remand trial the trial judge made very specific findings of fact and conclusions of law based upon the guidance provided by the New Jersey Supreme Court when it first considered this case and reversed summary judgments in Respondents' favor and remanded this matter.

The trial judge's opinion (Pet. App. 15a-31a) speaks for itself. Contrary to Petitioner's assertion, the trial court *never* held, as Petitioner claims that the damage issue was moot because the restrictive covenant sought to be enforced adversely impacts upon the public interest and the public need (Pet. 15). Rather, after reviewing the right factors which the New Jersey Supreme Court ruled must be considered in resolving the issue of the reasonableness *rel non* of restrictive covenants concerning the use of real property. *Davidson Bros. v. D. Katz & Sons,* 579 A.2d 288 (1990) (Pet. App. 45a-46a). Thus, the trial judge did not focus solely upon the "public interest/public need" factor. Instead, the court applied the right "reasonableness factors" articulated by the New Jersey Supreme Court and found the equitable servitude, in this case, to be unreasonable, and hence void. The breach of this void restrictive covenant would not give rise to a damage remedy. In any event, the trial court found Petitioner had not proven its damage, if any (Pet. App. 31a).

Finally, petitioner again misstates the conclusion of the trial judge with respect to the issue of the consideration paid for the equitable servitude. His Honor did state that he was unable to determine whether any consideration had been paid because the evidence did not establish that a specific dollar value had been

assigned to the restrictive covenant. Rather, the trial court held that there simply was no evidence to establish whether consideration had been given, and for the court to reach a conclusion in this regard would be utter speculation (Pet. App. 18a).

Other misstatements abound but there are none which can be said to have any bearing on the relatively straightforward issues raised by this Petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE PETITIONER FAILED TO PROPERLY RAISE ITS FEDERAL CLAIMS IN THE NEW JERSEY COURTS.

"It is a long settled rule that the jurisdiction of this Court to reexamine the final judgment of a state court arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981), *citing New York, ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). This "properly raised federal question" doctrine is based upon "powerful policy consideration" which "strongly indicate that [this Court] should apply this general principle with sufficient rigor to make reasonably certain that [this Court] entertain cases from state courts only where its record clearly shows that the federal issue has been properly raised below." *Webb v. Webb*, 451 U.S. at 499.

In the matter *sub judice* Petitioner failed to properly present the issue of whether the alleged taking of its purported property interest violated the United States Constitution. Petitioner did not

make reference to the "Takings Clause" of the Fifth Amendment until its most recent Petition for Certification to the New Jersey Supreme Court. No federal cases concerning the United States Constitution were cited until this late date. The simple fact is that Petitioner pled and attempted to prove its case based upon New Jersey law only. Petitioner treats its state law claims like a pea at a carnival shell game. This case was commenced by Petitioner in 1986. For over eight years Petitioner has presented its case to the courts of New Jersey premised upon the laws or constitution of the state. Now, after almost nine years of litigation, Petitioner attempts legal slight of hand and finally reversal that the pea has been under the shell of federal law all along. Such gamesmanship will not do in invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1257. Simply, Petitioner set up no claim on the state courts in the Constitution of the United States.

> At the minimum, however there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. at 501 (emphasis in original). It should come as no surprise that New Jersey requires that a claim first be raised in the trial court before it can be properly raised on appeal. This general principle has been applied where, as here, a party attempts to raise a constitutional issue for the first time in a appellate court, *see Planned Parenthood of New York City, Inc. v. State*, __ A.2d __ (1977). Now here, in its Petition, does the Petitioner identify any federal constitutional claim which was "timely and properly raised so as to give this court jurisdiction to review the judgment on a writ of certiorari." Rule 14(h). Instead, Petitioner refers generally and ambiguously to its raiding of the

takings issue in the state trial and it deserved to be compensated for the value if any of its equitable servitude. Never until its latest petition to the New Jersey Supreme Court, did Petitioner attempt to ground this claim on the *United States Constitution.* For example Petitioner refers to its trial brief as one instance when it raised the takings issue in state court (Pet. 9). This is misleading. Petitioner's trial brief makes clear that its claim for "compensation" is simply one for compensatory damages for breach of a restrictive covenant — not compensation for a "taking" in violation of the United States Constitution.

Petitioner's Complaint and Amended Complaint clearly indicate that its claim was premised primarily upon the alleged breach of its restrictive covenant not any taking the appropriate remedy for party which contends its property has been taken by a public body without just compensation is an action for inverse condemnation. *Bloomfield Twp. v. Rosanana's,* 602 A.2d 751 (App. Div. 1992). Typically, takings cases under the New Jersey Constitution rely upon N.J. Const., Art. 1, ¶ 20, which provides that "private property shall not be taken for public use without just compensation," *Pappas v. Board of Adjustment,* 603 A.2d 65 (App. Div. 1992). New Jersey still maintains separate courts of law and courts of chancery jurisdiction of an inverse condemnation proceeding is in the Law Division of the Superior Court. *Orleans Builders and Developers v. Byrne,* 453 A.2d 200 (App. Div. 1982). Petitioner instituted this suit in the Chancery Division. Thus, these New Jersey authorities indicate that Petitioner itself did not really view its claim as one of an unjust taking inasmuch as it did not pursue its usual course for relief in such cases and did not bring suit in the appropriate court for such cases.

To the extent it raised any constitutional issues, state or federal, this case was pled and presented, at least originally, as an illegal "giving" case rather than a takings case. The only

Constitution claim raised at any time in these proceedings (except for Petitioner's latest effort to inject a federal element in its Petition for Certification to the New Jersey Supreme Court) was based upon the *New Jersey Constitution's* prohibition against public entities making gifts to persons and corporations. N.J. Const., Art. 8, § 3, ¶¶ 2-3. *See Davidson Bros. v. D. Katz & Sons, Inc.* (Pet. App. 50a). The genesis of this claim was a rent-free lease between the New Brunswick Housing Authority and C-Town. However, after the remand by the New Jersey Supreme Court, this state constitutional claim was abandoned by Petitioner (Pet. App. 17a).

On remand, therefore, *no* constitutional questions, state *or* federal were raised. Petitioner proceeded solely on the theory that it was entitled to compensatory damages for breach of contract. After Petitioner lost the remand trial, it appealed to the Appellate Division of the Superior Court — New Jersey's intermediate appellate court; *no* constitutional issues — state or federal — were raised on this appeal. At no time after remand did Petitioner seek to amend its pleadings to set forth a federal claim.

Petitioner disingenuously suggests that the Appellate Division ignored "the repeated efforts of Davidson Bros. to raise the takings issue" before that court (Pet. 15). The simple fact is that Davidson Bros. failed to argue on appeal that there were any federal, constitutional issues implicated in this case. Thus Petitioner cannot now be heard to complain that the Appellate Division failed to address this argument inasmuch as it was never properly presented to that court.

Another factor in Petitioner's presentation of this case indicates further that Petitioner, itself, did not view this as a Fourteenth/Fifth Amendment case until the very last stage of appeal in the state court system. In its pleadings, Petitioner lumped together all the defendants in the claims for relief. Two of

the Respondents herein (C-Town and D. Katz & Sons, Inc.) are indisputably private corporate entities. No separate claim was made against the two public entities (City of New Brunswick and the Housing Authority[1]). C-Town and D. Katz & Sons, Inc., would not be proper defendants on a "Takings Clause" claim arising under the Fifth and Fourteenth Amendments to the United States Constitution because they are not "state actors." The facts that the states of New York and New Jersey granted these entities corporate charters does not render them government agents. *See San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. 522, 543 (1986).

Certainly, C-Town's operation of a supermarket cannot be characterized as performing functions that have been "traditionally the *exclusive* prerogative" of the federal government. *San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. at 544 (emphasis in original). Indeed, in the first incarnation of this case, prior to the remand by the New Jersey Supreme Court in 1990, Petitioner had argued strenuously, in support of its State Constitution "givings" claim, that the existence of a supermarket was not even a *legitimate* "public purpose," much less an "exclusive" one. Because Petitioner did not raise its federal claim below, C-Town has no idea on what basis C-Town, a purely private concern, engaged in "state action" necessary to support the claims now asserted against it. Indeed, had these federal constitutional claims been asserted against C-Town, it would have moved to dismiss them, at the appropriate stage in the litigation, on the ground that C-Town is not a "state actor." But this is precisely the point. Petitioner's failure to frame its claims in terms of the Federal Constitution resulted in an inadequate record on this important issue of whether at least two of the

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1. Assuming, *arguendo*, that the Housing Authority is a public entity. Whether it is or not was never explored below as Petitioner never properly raised a federal constitutional claim.

Respondents herein are "state actors" whose activities are subject to the Fifth and Fourteenth Amendments. The state courts below never had an opportunity to pass on this question. Thus, Petitioner has ignored the "very practical reasons for insisting that federal issues be presented first in the state court system." *Webb v. Webb,* 451 U.S. 493, 500 (1981) (need to develop full record, identification of independent and adequate state grounds for decision, etc.).

In sum the *only* constitutional claim ever properly asserted below was one based on the New Jersey Constitution's prohibition of gifts of public property to private corporations. This claim was abandoned at the commencement of the remand trial. Otherwise, Petitioner's claim for "compensation" was simply one for compensatory damages for the alleged breach of a restrictive covenant. In its trial brief submitted before the remand trial, Petitioner argued that "[T]he sole issue remaining for the Court is an award of money damages. Compensatory damages are designed to 'put the injured party in as good a position as he would have been if performance had been rendered as promised' (citation omitted). Compensatory damages *for breach of a restrictive covenant* are measured by the loss sustained by the Plaintiff by reason of the violation by the Defendant of the agreement (citation omitted)." Clearly, then, Petitioner's claim for relief was premised upon an alleged violation of an *agreement.* The claim was not based upon any allegation of a violation of the Federal (or New Jersey) Constitution. The claim actually litigated in the state courts was a straightforward state common law claim. Petitioner's entitlement to damages depend upon the legality (or under New Jersey law, the "reasonableness") of the restrictive covenant in question. Because Petitioner failed to raise its federal claim in the state proceeding, the state court below failed to rule on the "takings issue" which Petitioner now asserts. As a result, this Court is without jurisdiction in this case. *Webb v. Webb,* 451 U.S. at 501.

II.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Even assuming, *arguendo*, that Petitioner properly raised its federal claim in the state court system, a writ of certiorari, still, should *not* be granted.

Petitioner relies primarily upon this Court's decision in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994) in support of its argument that Respondents violated the United States Constitution. However, *Dolan* does not stand for the proposition that the government must pay compensation for "taking" a property interest which is illegal, such as Petitioner's equitable servitude. Nor do any of the other federal authorities cited in the Petition (none of which were cited in the state court) stand for such an outrageous proposition.

In 1990, the New Jersey Supreme Court, in this same litigation, announced a new standard for determining whether restriction on the use of real property is enforceable or not. *See Davidson Bros. v. D. Katz & Sons* (Pet. App. 32a-69a). The remand judge commented in his bench opinion, that the New Jersey Supreme Court's decision was "as clear a case as [he had] ever read . . . ," and that this opinion provided "a clear road map . . . on the issue of the reasonableness or unreasonableness of commercially imposed restrictive covenant." (Pet. App. 16a-17a). "Road map" in hand, the trial judge painstakingly set forth by the New Jersey Supreme Court to the facts of this case and found the covenant in question to be unenforceable.

Petitioner's covenant is a nullity. Nevertheless, Petitioner claims that it should be compensated for its "taking" stripped to its essentials. Petitioner's claim is that of a federal constitutional

right to get something for nothing. This is not a substantial federal question, to say the least.

In closing, it should be noted that the trial judge observed on remand that even if Petitioner's restrictive covenant was enforceable, Petitioner failed to shoulder its burden of proving any damages as a result of any breach of that covenant. We respectfully submit that it would be an inappropriate use of this Court's limited resources to grant certiorari where the Petitioner was unable to prove any damages flowing from what is now cast as the "taking" of a property interest.

CONCLUSION

For the reasons set forth, therefore, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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